IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

REVIEW PETITION STAMP NO. 21874 OF 2005
IN
CIVIL APPLICATION NO. 599 OF 2005
IN
CROSS OBJECTION STAMP NO. 28767 OF 2005
IN
FIRST APPEAL NO. 57 OF 2005
IN
B.C.C.C. SUIT NO. 1787 OF 1984

Hiralal Ghanshamdas Kukreja
& Ors. ..Petitioners

versus

Mohanlal Ghanshamdas Kukreja
& Anr. ..Respondents

Mr. U. J. Makhija with Mr. W. N. Yande and Ms. Preeti Shah, Advocates for the Petitioners.

Mrs. Gauri Godse with Mr. A. V. Jain for the Respondents.

CORAM : D. G. DESHPANDE,J.
DATE : 6TH DECEMBER,2005

ORAL ORDER : (IN CHAMBER)

1. Heard Mr. Makhija for the petitioners of this Review Petition and Mrs. Gauri Godse for the respondents.

2. First Appeal No. 57 of 2005 and Cross Objection Stamp No. 28767 of 2005 were before me.

Civil Application No. 599 of 2005 came to be filed by Mohanlal, who is the respondent in this Review Petition. There was another Civil Application No. 127 of 2005 which came to be filed by the petitioners herein. Both the Civil Applications were decided by me by my order dated 16.9.2005 whereby Civil Application No. 599 of 2005 filed by Mohanlal - the respondent herein was allowed and the Court Receiver was directed to visit the spot, give one opportunity to the original plaintiffs to offer two rooms and common use of kitchen to Mohanlal and if they do not accept the offer, the Court Receiver was directed to put Mohanlal in possession of one bedroom, hall for common enjoyment and kitchen for common enjoyment as an agent of the Court Receiver without any royalty and security. The Review Petition is directed against this order.

3. The Review Petition is permissible if new and important matter or evidence is discovered after the order, and, which could not be produced after due diligence when the impugned order came to be passed or it is permissible if there is some mistake or error apparent on the face of record or if there is any other sufficient reason. This is not a case

where there is any discovery of new or important matter. Therefore, this Review Petition is not under this particular provision of Order 47 Rule 1 of the Code of Civil Procedure. According to Mr. Makhija, the review is because of an error apparent on the face of record, and, the error is not, taking into consideration the earlier orders of this Court and Mr. Makhija also contended that there is other sufficient reason for review.

4. Appeal No. 57 of 2005 came to be filed by the original plaintiffs, who are petitioners of this Review Petition. They had filed a suit for permanent injunction. That suit came to be dismissed by City Civil Court by Judgment dated 9.9.2004 by deciding issue No.3, viz. Whether in view of the order dated 10.9.2001 passed in High Court Suit No. 1143 of 1986 reliefs claimed in the suit have become infructuous? First Appeal No. 57 of 2005 of the Appellants was admitted. Original defendant Mohanlal filed Cross Objection in this appeal, and, then the aforesaid two Civil Applications came to be filed.

5. Suit No. 1143 of 1986 in the High Court

Original Side was a suit filed by Mohanlal for partition of his 1/18th share. A preliminary decree came to be passed in that suit. In the Civil Application No. 599 of 2005 prayer of Mohanlal was that the Court Receiver, High Court Bombay, be appointed in respect of one bedroom, hall and kitchen and he should be appointed as agent of the Court Receiver without paying royalty or deposit. These prayers were granted by me by impugned order, hence this Review Petition.

6. Mr. Makhija brought to my notice that my observations in the impugned order that ".....Now by virtue of decree in his favour, he has become entitled to ....." they are without any basis and there is no decree in favour of Mohanlal. This is not a factual position. Preliminary decree for partition in suit filed by Mohanlal on the Original Side is there and that decree has given him a right to get possession. It may be that the said preliminary decree for partition has been challenged by the other side by filing appeal. But my findings in the impugned judgment are on the basis of the record and there is nothing wrong in that.

7. According to Mr. Makhija while passing the impugned order, I did not take into consideration the other interim orders or ad interim orders, and, this has resulted in the wrong order being passed by me. My attention, in particular, was drawn by Mr. Makhija to the order passed by the Division Bench of Justice Lodha and Justice Mohta dated 27.2.2004 in Notice of Motion No. 3383 of 2003 (Notice of Motion not properly legible. It is annexed as Exhibit 'G' page 84 of Review Petition). The order is as under:

> **"After having heard the learned counsel for the parties, we are satisfied that until further orders the respondents be restrained from parting with possession of the suit bungalow or inducting any third party or creating any third party right, title or interest in respect of the suit bungalow or any part thereof. We order accordingly.**
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> **Notice of Motion stands disposed of."**

Mr. Makhija contended that the prayers in the Notice of Motion were similar to those in Civil

Application No. 599 of 2005 i.e. prayers for appointment of Court Receiver and Mohanlal being permitted to use the aforesaid rooms in the said bungalow. Mr. Makhija contended that when the Division Bench by this order refused to grant any such reliefs, then, I should not have passed the impugned order.

8. I do not find any merit in this submission. The order of the Division Bench was an order in a Notice of Motion pending in an Appeal. I have passed the impugned order pending Appeal and Cross Objections. There is no final decision regarding the rights of the parties. My order is pending the Appeal. The final result of the Appeal will decide whether that order to continue for ever or it is to come to an end at the decision of the Appeal and Cross Objection. In my order, I have noted down the entire history of litigation between the parties and even if the order of the Division Bench, referred to above, is there, that does not disentitle Mohanlal from claiming the reliefs in this case because the order in the notice of motion was interim or ad interim order. The application in view of the pendency of the present appeal and cross objection

was maintainable and when declaration of his right in the preliminary decree is passed in his favour for partition, he becomes entitled to atleast till the pendency of the appeal to occupy bungalow.

9. It was also pointed out that in the suit filed for partition, he had not asked for possession but only claimed compensation. The preliminary decree has been passed in his favour but the delivery of possession is stayed, and, claiming compensation does not mean giving up a right of occupancy.

10. Mr. Makhija also contended that the bungalow is not divisible by metes and bounds. I have already noted his submissions in that regard. In my impugned order my order nowhere lays down that bungalow should be partitioned and he should be placed in possession. A mere right of occupation and residence is given by me. There is no merit in this Review Petition. It is dismissed. Interim order of stay is vacated. No order as to costs.

6.12.2005 (D.G. DESHPANDE, J.)

. The matter was kept today in chamber for

orders. After the order was pronounced in Chamber, Counsel for the petitioners prayed for continuation of stay for a period of four weeks. Operation of this order is stayed for a period of four weeks from today.

6.12.2005 (D.G. DESHPANDE,J.)